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In The

SUPREME COURT OF THE UNITED STATES

(OCTOBER TERM, 1972)

No. 72-1366

EDWARD NORWELL,

Petitioner,

vs.

CITY OF CINCINNATI, OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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In The

SUPREME COURT OF THE UNITED STATES

(OCTOBER TERM, 1972)

No. _____

EDWARD NORWELL,

Petitioner,

vs.

CITY OF CINCINNATI, OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner respectfully petitions this Honorable Court to grant a writ of certiorari to the Supreme Court of Ohio to review a judgment of that Court, which dismissed petitioner's appeal to that Court from a conviction by the Municipal Court of Hamilton County, Ohio.

OPINIONS BELOW

The decision of the Hamilton County Municipal Court is printed herein at Appendix, page 16. The opinion of the Court of Appeals, First Appellate District, State of Ohio, is printed herein at Appendix, page 17. The decision of the Supreme Court of Ohio is printed herein at Appendix, page 21.

JURISDICTION

On February 14, 1972, petitioner (herein called defendant) was convicted of disorderly conduct for "noisy" behavior in violation of Section 901-D4 of the Cincinnati Code of Ordinances and judgment of conviction was entered by the Municipal Court of Hamilton County, Ohio. On August 28, 1972, the Court of Appeals, First Appellate District, Hamilton County, Ohio, affirmed the judgment. On January 12, 1973, the Supreme Court of Ohio overruled defendant's motion for an order directing the Court of Appeals to certify the record and dismissed defendant's appeal holding that no "substantial constitutional question exists." Defendant's motion for rehearing was overruled on March 9, 1973.

Title 28 Section 1257 (3) USCA confers on this Court jurisdiction to review the judgment.

QUESTIONS PRESENTED FOR REVIEW

1. Is a criminal ordinance punishing "noisy, boisterous, rude, insulting or other disorderly" behavior "with the intent to annoy any person" unconstitutional upon its face because it is vague, overbroad and conducive to discriminatory enforcement?

2. Is a forcible stop and seizure unjustified where a police officer is relying upon an anonymous tip that a "suspicious" person is hanging around a pony keg but finds, upon inspection, nothing indicating that criminal activity is afoot in the area or that defendant is armed, dangerous, or engaged in unlawful conduct?

3. Is the enforcement of a criminal ordinance against a "noisy" response to a forcible stop and seizure, unconstitutional where defendant's intent is solely to exercise his

right to free speech, free movement upon the streets, and the freedom to remain silent and refuse to answer a police officer's questions?

CONSTITUTIONS AND ORDINANCES

The First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution are set forth at Appendix, pages 26 and 27. Sections 901-D4 and 903-6 of the Code of Ordinances of the City of Cincinnati are set forth at Appendix, pages 25 and 26.

STATEMENT OF THE CASE

Defendant Norwell is a 69 year old resident of Cincinnati, Ohio (R. 14).[1] He came from the "old country" more than 20 years ago and has lived ever since at 506 Tusculum Avenue (R. 14). He never has been in trouble or arrested or convicted of any offense in his entire life (R. 18, 19).

Norwell's son is the manager and co-owner of a pony keg on Stanley Avenue, which is only a few blocks from Norwell's home on Tusculum Avenue (R. 14). Norwell visits the pony keg every night and works there part-time (R. 14).

On December 25, 1971, Christmas night, Norwell left the pony keg and took a walk, prior to his returning home to hear the eleven o'clock news (R. 14, 15).

At approximately 10:30 P.M., Cincinnati Police Officer Marvin Johnson received a radio run to the 300 block of Stanley Avenue to investigate an anonymous tip that there was "a suspicious man hanging around the pony

[1] The "R" references are to pages of the bill of exceptions and transcript of the proceedings in the trial court.

keg which was closed" (R. 4, A. 28).[2] Upon his arrival at the scene, Johnson observed the defendant "walking away from the pony keg" (R. 4) (A. 28). Officer Johnson drove into the pony keg's parking lot, got out of his patrol car, inspected to determine whether the pony keg had been broken into (it had not), and then "went after" the defendant (R. 6) (A. 29).

Officer Johnson approached Norwell and asked him if he lived in the area. Defendant looked at Johnson, "then turned around and walked away." "When he started to walk away," Johnson placed his hands on the defendant and "attempted to stop him" (R. 4) (A. 28). Defendant objected to the stop by pushing Johnson's arm away ("he threw my arm off") and vocally asserting, "Get off of me. I don't have to tell you people anything" (R. 4, 7) (A. 28). Norwell kept walking at a normal pace. Johnson again attempted to stop the defendant, and again the defendant objected vigorously, saying "Again, I told you before, I don't tell you people anything" . . . (R. 5) (A. 28) "get your arm off of me" (R. 9) (A. 29). According to Johnson, "I placed him under arrest when he threw my arm off of him the second time in a loud and boisterous manner" (R. 6) (A. 29).

"Q. *What is the specific act which you arrested my client for?*

A. *For being loud and boisterous.*" (R. 8) (A. 29) Answering the question "who was he annoying?" Johnson replied, "he was annoying me." (R. 9) (A. 30)

Although there was evidence of a struggle *after* the arrest, the officer did not charge defendant with any physical misconduct stating:

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[2] The "A" references are to the pages of the appendix, in which the testimony has been copied.

> "I didn't charge the man with resisting because I didn't think it was a warranted cause. It didn't seem he knew why he was being arrested." (R. 9) (A. 30)

The trial court found defendant guilty of "disorderly conduct with the intent to annoy," "for being so noisy," and levied a $10 fine. (A. 16)[3] In its opinion the court criticized Norwell for failing to keep his "cool," for being "hostile" to the officer, for having "a feeling against" the officer, and for refusing to "cooperate." (A. 16)

The court stated:

> "This officer would have let him go if he explained who he was and so forth, instead of being angry about it." (A. 16)

The Court of Appeals held that the officer had sufficient grounds for the "stop" and that Norwell had no right to "become noisy" with respect to his refusal to answer the officer's questions. (A. 18)

HOW FEDERAL QUESTIONS WERE RAISED

All the constitutional questions raised in this petition were raised in the assignment of errors listed in defendant's appeal to the Court of Appeals, First Appellate District and were decided adversely to defendant in the opinion of the Court of Appeals set forth at Appendix, pages 17-18.

Constitutional issues were also contained in defendant's motion to dismiss the charges in the trial court set forth at Appendix, page 30.

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[3] This case does not involve any issues relating to any alleged misconduct taking place after the arrest.

ARGUMENT AMPLIFYING REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

I.

A CRIMINAL ORDINANCE PUNISHING "NOISY, BOISTEROUS, RUDE, INSULTING OR OTHER DISORDERLY" BEHAVIOR "WITH THE INTENT TO ANNOY ANY PERSON" IS UNCONSTITUTIONAL UPON ITS FACE BECAUSE IT IS VAGUE, OVERBROAD AND CONDUCIVE TO DISCRIMINATORY ENFORCEMENT.

Defendant was convicted for a violation of a portion of Section 901-D4 of the Cincinnati Code of Ordinances which reads:

> "No person shall wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person. . . ."

The ordinance is unconstitutional on its face.

Its "vagueness — the absence of ascertainable standards of guilt" which hinders the public from knowing what activity is prohibited — is a fatal infirmity, *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972).

Like the Cincinnati "loitering" ordinance, which this Court has previously ruled to be unconstitutional *per se,* the "disorderly conduct" ordinance's enforcement "may entirely depend upon whether or not a policeman" is "annoyed," and the "annoyance" test lacks objective specificity, *Coates* v. *Cincinnati,* 402 U.S. 611 (1971).

The ordinance punishes "noisy, boisterous, rude, insulting" speech. The restrictions on freedom of expression

are severe. The ordinance "sweeps within its broad scope activities that are constitutionally protected for speech and assembly," *Cox* v. *Louisiana*, 379 U.S. 536 (1965).

Prohibiting "noisy, rude, insulting" speech, not limited to "fighting" words, tending to cause an immediate breach of the peace or violence infringes too deeply upon citizens' rights to engage in heated arguments, assemblies, and other discourse involving pure speech and sound, *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

In the *Gooding* case, the Georgia statute, which this Court held to be unconstitutionally vague, read:

> "Any person who shall, without provocation use . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."

The Cincinnati ordinance, is even more offensive as to its potentional infringement upon speech, not involving "fighting words."

The ordinance is an example of ancient broad catch-all laws, which encourage arbitrary, selective, and discriminatory enforcement. *President's Commission on Law Enforcement & Administration of Justice, The Police* 187-188 (1967).

Because of the unbriddled discretion it places in the hands of policemen; its lack of requisite narrow specificity; and its chilling effect upon First Amendment rights, the ordinance does not pass constitutional muster.

II.

A FORCIBLE STOP AND SEIZURE IS UNJUSTIFIED WHERE A POLICE OFFICER IS RELYING UPON AN ANONYMOUS TIP THAT A "SUSPICIOUS" PERSON IS HANGING AROUND A PONY KEG BUT FINDS, UPON INSPECTION, NOTHING INDICATING THAT CRIMINAL ACTIVITY IS AFOOT IN THE AREA OR THAT DEFENDANT IS ARMED, DANGEROUS, OR ENGAGED IN UNLAWFUL CONDUCT.

This case involves defendant's "noisy" resistence to an illegal forcible "stop" and "seizure."

There is no question that Norwell was "seized" within the meaning of the Fourth Amendment.

> "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person," *Terry* v. *Ohio,* 392 U.S. 1 (1968).

Was Officer Johnson's seizure of Norwell "reasonable" under the *Terry* doctrine? We think not.

There was no evidence that "criminal activity was afoot." The pony keg was secure. There was no report of any crime having been committed, or being committed or about to be committed. There was nothing in Norwell's behavior indicating he was either "armed or dangerous." There was merely an anonymous tip of "a suspicious man hanging around the pony keg" (R. 4) (A. 28). When approached by the police officer, Norwell did not flee or run, but merely kept walking at a normal pace. There was no objective facts indicating he was engaged in any unusual or criminal activity. A mere good faith suspicion, or hunch on the part of the officer does not justify

an investigatory stop. As noted in *Adams* v. *Williams,* 32 L.Ed. 2d 612 (1972):

> "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized."

The instant case falls into the category of situations discussed by Mr. Justice White in his concurring opinion in *Terry*:

> "Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go his own way."

Fact patterns more "suspicious" than the case at bar in which a forcible stop was found unjustified are *U.S.* v. *Hostetter,* 295 F. Supp. 1312 (D.C. Del. 1969) (Defendant walking in the rain carrying black suitcase) (*People* v. *Moore,* 72 Cal. Rptr. 800 (1968)) (Defendant seemed nervous in telephone booth) (*State* v. *Ramey,* 30 Ohio Misc. 89 (1971)) (Defendant had chisel in rear pocket and seemed under the influence).

Since the officer's attempt at forcible seizure was unjustified, defendant's "noisy" objections and resistence cannot be a crime. As stated in *Wright* v. *Georgia,* 373 U.S. 284 (1963):

> "Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the constitution."

In Ohio "every person has the right to resist an unlawful arrest; and in preventing such illegal restraint on his liberty, he may use such force as may be necessary," 5 *Ohio Jurisprudence* 2d 61.

An Ohio case on "all fours" is *Columbus* v. *Holmes*, 107 Ohio App. 391, (1958) where defendant was convicted of disorderly conduct in "trying to break away from a (police) officer's grasp" in an attempt to protect her auto. The Court held that a citizen need not "meekly" comply with unauthorized orders of the police.

In this Norwell case the "resistence" was primarily verbal ("loud and boisterous") rather than physical and a *fortiori* was justified and non-criminal under Ohio law, if the "stop and seizure" was in violation of the Fourth Amendment under the *Terry-Adams* doctrine.

No robbery had taken place. There was no indication of criminal activity in the area. Norwell's behavior at the scene was neither dangerous nor unusual. Therefore Officer Johnson had no right to accost or otherwise physically interfere with his movements.[4]

Punishing his reasonable resistence to the illegal stop violates the Fourth Amendment.

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[4] See also the Cincinnati Code of Ordinances Section 903-6 which allows stops and search *only* when the officer has "reasonable grounds" to believe defendant "is committing, has committed, or is about to commit a crime" (A. 25-26). Merely because the pony keg had been broken into on past occasions (p. 4, 14) of course, provides no justification for a stop and seizure of Edward Norwell, in view of the total absence of evidence relating to any break in on the night in question.

III.

THE ENFORCEMENT OF A CRIMINAL ORDINANCE AGAINST A "NOISY" RESPONSE TO A FORCIBLE STOP AND SEIZURE IS UNCONSTITUTIONAL WHERE DEFENDANT'S INTENT IS SOLELY TO EXERCISE HIS RIGHT TO FREE SPEECH, FREE MOVEMENT UPON THE STREETS, AND THE FREEDOM TO REMAIN SILENT AND REFUSE TO ANSWER A POLICE OFFICER'S QUESTIONS.

Norwell's right to walk upon Stanley Avenue, two blocks from his home, in his own neighborhood, near his place of employment is constitutionally protected.

Papachristou v. *City of Jacksonville,* sets forth his right as a "night walker" to "walk or loaf or loiter or stroll," free from arrest merely "because he might look suspicious to the police."[5] 405 US 156 (1972)

Terry v. *Ohio,* outlines his right to personal security — and freedom from unreasonable seizures. 392 US 1 (1968)

His right to remain silent under the Fifth Amendment cannot be questioned. Indeed the Court of Appeals below correctly held that Norwell "had a right to refuse to answer the officer's questions." As noted by Mr. Justice White:

> "Of course, the person stopped is not obliged to answer, answers may not be compelled, and *refusal to answer furnishes no basis for an arrest.*" (emphasis ours) (concurring opinion in *Terry*)

In addition, Norwell had a right to argue with and criticize the officer, even using vulgar and profane language.

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[5] "Plaintiff's right to walk . . . while sober and well behaved" may be enforced by injunction against police who interfere, *Gomez* v. *Wilson,* 323 F. Supp. 87 (DDC 1971).

Cohen v. *California*, 403 U.S. 15 (1971); *Williams* v. *District of Columbia*, 136 U.S. App. D.C. 56, 419 F.2d 638 (1969); *Anniskette* v. *State*, 489 P.2d 1012 (Alaska) (1971).

Recognizing his freedom of movement, freedom of speech, and freedom to remain silent, Norwell vigorously protested the officer's attempts to manhandle him. He asserted:

> "I don't have to tell you people anything" (R. 5) (A. 28)
> "I told you before, I don't tell you people anything" (R. 9) (A. 29).
> "Get your arm off me" (R. 9) (A. 29).

Assuming *arguendo* that the officer had a right to briefly stop and lay hands upon him, and that his response was "loud and boisterous,"[6] it is still clear that the "noisy" response was intended as an attempt to exercise his lawful right to walk home, free from interference and questioning.

In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), this Court sustained the Kentucky "disorderly conduct" statute because the Kentucky Courts construe the statute as constituting a crime "only where there is no bona fide intention to exercise a constitutional right." See also *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).[7] The Supreme Court of Ohio in *Cincinnati* v. *Hoffman*, 31 Ohio St. 2d 163 (1972) cert. denied 1973 (72-897) gives lip service to the *Colten - Chaplinsky* doctrine, suggesting that the Cincinnati ordinance, might be narrowingly construed not to prohibit "the lawful exercise of any constitutional right."

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[6] There was no evidence of the level, degree, length of time and nature of the "noise" or the context of the noise in relation to the environment.

[7] In *Chaplinsky*, the statute's prohibitions on speech were only sustained because the courts of New Hampshire restricted their application only to "fighting" words directly tending to cause violence.

However, this Norwell case shows that Ohio, in fact, is *not* strictly construing the Cincinnati ordinance. To the contrary, the trial court's finding, affirmed by the high appellate courts of Ohio, shows that Norwell was convicted solely because of his refusal to cooperate and "noisy" speech.

Edwards v. *S. Carolina*, 372 U.S. 229 (1963), which reversed convictions for "loud" and "boisterous" speech and singing is on "all fours" with the facts herein and should be dispositive of the issues.

Norwell did not threaten or curse at the officer or say or do anything "aggressive." He did not utter "fighting words." His entire posture was *defensive*. By his vocal objections to the stop and to the questioning, he was exercising his lawful rights. Any collective interest of the public in prohibiting "noise"[8] must yield to the more important governmental interest of allowing and encouraging free speech, free movement, the right to personal security, and the right to remain silent.

Even if the forcible stop was justified, the conviction for "hostile" attitude, "loud and boisterous" objections, "suspicious" behavior, and refusal to answer questions, is nevertheless prohibited under the United States Constitution.

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[8] There was no evidence that Norwell's "noisy" utterances disturbed any member of the public or any person other than the police officer, c.f., *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) where the Court upheld restrictions on sound trucks.

CONCLUSION

The decisions of this Court in the *Terry, Adams, Colten, Gooding* and *Papachristou* cases need further amplification. Citizenry and police need more guidance as to their rights. This case gives this Court the opportunity to delineate (1) the limits of police authority to make investigative stops and, (2) the limits of legitimate response on the part of an innocent citizen, seeking to protest unjustified intereference from the police.

Norwell may be subject to criticism for not being courteous to the police. But the trial judge found his uncooperative attitude to be not only poor citizenship, but also a crime – which now is an indelible blot on defendant's otherwise spotless record.

In the Soviet Union and other totalitarian societies, no citizen would dare assert the right to ignore and walk away from questioning by a policeman and to challenge the police by "noisy" argument. However in these United States, including Ohio, these rights are secure – at least from criminal prosecution for their exercise.

The officer, acting upon a mere anonymous tip, which turned out to be false, did not have sufficient grounds to forcibly stop Norwell. Furthermore, application of the vague and overbroad Cincinnati disorderly conduct ordinance to this defendant is a material invasion of his freedom of personal security, speech, movement and right to remain silent.

For these reasons the writ should be granted and the conviction set aside.

Respectfully submitted,

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APPENDIX

FINDINGS AND DECISION OF THE TRIAL COURT, CASE NO. 95863, HAMILTON COUNTY MUNICIPAL COURT (JUDGE DENNING) FEBRUARY 14, 1972.

THE COURT: Let me say now, this hall is for the benefit of the public. The police officer in doing his job responded because some good citizen, no doubt, called the police department and said there was somebody suspicious around the pony keg, knowing it had — there was a situation there that requires the alertness of the public; and some citizen was alert and called the police officer. If this man is — his son is connected with the pony keg, he ought to be willing to cooperate instead of getting hostile about it. Now, this police officer certainly would have never called another police officer had he kept his cool and asked what it was all about and so forth, but he never gave the police officer a chance, and he became very hostile. The whole incident arose for the protection of the son's pony keg. Why, he gets so — just because he says he doesn't smell of liquor, maybe he does; he doesn't have to cause the hostility, but he was hostile to the officer. This officer (indicating) would have let him go if he explained who he was and so forth, instead of being angry about it. This police officer had no disposition to arrest him had he told him his connection. I'm sure he had no feeling against this man, but this man had a feeling against him, at this time, and was not at a liberty to say — the Court finds Mr. Norwell guilty of disorderly conduct with the intent to annoy. All right, the Court fines $10.00 and costs for being so noisy. The Court will take a 10 minute recess.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-72128

CITY OF CINCINNATI,
Plaintiff-Appellee,

vs.

EDWARD NORWELL,
Defendant-Appellant.

DECISION

(Filed August 28, 1972.)

Miss Isabel Guy and Messrs. Ralph E. Cors and Harold B. Attix for Plaintiff-Appellee,

Mr. Paul H. Tobias for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon appeal on the transcript of the docket and journal entries and the original papers from the Hamilton County Municipal Court and transcript of the proceedings, the assignments of error and the briefs and arguments of counsel.

The first assignment of error is not well taken for the Supreme Court of Ohio has held that the ordinance in question is not violative of the 14th Amendment of the Constitution of the United States.

The second assignment of error is not well taken for the record herein fails to demonstrate that the application of the ordinance in question would amount to a deprivation of the appellant's constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

The third assignment of error is not well taken for there was sufficient evidence of probative value to support the judgment of the trial court that the appellant was guilty of disorderly conduct.

Further, the fourth assignment of error is not well taken for the record demonstrates that the police officer had sufficient grounds to stop the appellant and inquire as to his presence and actions at that time and place. The appellant had a right to refuse to answer the officer's questions but not to become noisy or disorderly in so refusing.

The judgment of the Hamilton County Municipal Court is affirmed.

HESS, P.J., YOUNG and SHANNON, J.J.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

NO. C-72128

CITY OF CINCINNATI,

Appellee,

vs.

EDWARD NORWELL,

Appellant.

JUDGMENT ENTRY

(Entered August 28, 1972.)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Municipal Court, Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Municipal Court of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Municipal Court of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by his counsel, excepts.

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM

To wit: January 12, 1973

No. 72-784

THE STATE OF OHIO,
City of Columbus.

CITY OF CINCINNATI,

Appellee,

vs.

EDWARD NORWELL,

Appellant.

APPEAL FROM THE COURT OF APPEALS

for Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this . . day of . . . . . 19. .

. . . . . Clerk

. . . . . Deputy

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM
To wit: January 12, 1973

No. 72-784

THE STATE OF OHIO,
City of Columbus.

CITY OF CINCINNATI,

Appellee,

vs.

EDWARD NORWELL,

Appellant.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
for Hamilton County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.
COSTS:
Motion Fee, $20.00, paid by Goldman, Cole & Putnick.
I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .. day of ..... 19..

..... Clerk

..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM
To wit: March 9, 1973

No. 72-784

THE STATE OF OHIO,
City of Columbus.

CITY OF CINCINNATI,

Appellee,

vs.

EDWARD NORWELL,

Appellant.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. . . Page . .

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 9th day of March, 1973.

THOMAS L. STARTZMAN, Clerk.
By ..... Deputy.

CODE OF ORDINANCES OF THE CITY OF CINCINNATI

Section 901-D4 of the Code of Ordinances of the City of Cincinnati:

Disorderly Conduct.

"No person shall wilfully conduct himself or herself in a noisy, boisterious, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person or the citizens of the city or any portion thereof, or disturb the peace, good order and quiet of the city by provoking or engaging in a fight or quarrel, or permit or suffer such act or acts made unlawful herein to be committed on or about his or her house, or any premises attached thereto.

For the purpose of enforcing the provisions of this section, it shall be lawful for any officer to enter any house, outhouse, garden or place of amusement to arrest any person violating any of the provisions of this section.

Whoever violates this section shall be fined not more than one hundred dollars ($100.00), or imprisoned not more than thirty (30) days, or both, for a first offense, and for a second or subsequent offense shall be fined not more than one hundred dollars ($100.00), or imprisoned not more than ninety (90) days, or both."

Section 903-6 of the Code of Ordinances of the City of Cincinnati:

Stop and Search on Reasonable Suspicion.

"A police officer may stop any person abroad in a public place whom he has reasonable grounds to believe is committing, has committed or is about to commit a crime, and may demand of him his name, address and an explanation of his actions. When a police

officer has stopped a person for questioning pursuant to this section and reasonably suspects that he or any other person is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning at which time he shall either return it, if lawfully possessed, or arrest such person."

CONSTITUTION OF THE UNITED STATES

CONSTITUTION OF THE UNITED STATES, FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES, FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CONSTITUTION OF THE UNITED STATES, FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS CASE NO. 95863 CITY OF CINCINNATI v. EDWARD NORWELL, FEB. 14, 1972

DIRECT EXAMINATION OF PATROLMAN MARV JOHNSON

Q. O.K., would you tell the Court what occurred on that occasion?

A. Approximately 10:30 p.m., I received a radio run to the 300 block of Stanley Avenue to investigate a suspicious man hanging around the pony keg which was closed. Also, that pony keg had been broken into several times before. When I arrived on the scene, the defendant was walking away from the pony keg. I parked the police car and approached the defendant, asked him if he lived in the area. He looked at me, and then he turned around and walked away. When he started to walk away, I attempted to stop him. He threw my arm off. He said, "Get off of me. I don't have to tell you people anything." He started to walk away. I said, "Look, I don't know what you mean by people, but I'm a police officer — (p. 4.)

* * *

A. He started walking towards *Mav's Place,* again even after I explained everything to him. He never said anything. He turned around and walked away. I started to stop him again. At this time, he threw my arm off. He said, "Again, I told you before, I don't tell you people anything". He started to walk again. I placed him under arrest . . . (p. 5)

CROSS EXAMINATION OF PATROLMAN JOHNSON

Q. Well, you never then did tell him what he was under arrest for?

A. No, I placed him under arrest when he threw my arm off of him the second time in a loud boisterous manner. (p. 6)

* * *

Q. He came up to you and started talking to you?

A. You see he was walking up the street. He was walking from the pony keg. He was the only man who was coming from the pony keg.

THE COURT: How far from the pony keg was he?

PATROLMAN JOHNSON: There is a parking lot there. When I pulled into the parking lot, he was walking away from the pony keg then.

THE COURT: Was he on the property of the pony keg?

PATROLMAN JOHNSON: So, I got out, and I checked the pony keg out first to see if it was broken into. Then, I went after him. (p. 6)

* * *

Q. What is the specific act which you arrested my client for?

A. For being loud and boisterous. (p. 8)

* * *

Q. At what point did you notify my client he was under arrest?

A. The second time that I explained that I was a police officer and my reason for being there, and he started to walk away, and I was going to stop him, and he threw my arm off, and he said, "Get your arm off of me. I told you before I don't tell you people anything." (pp. 8-9)

Q. Did you tell him what he was under arrest for?

A. I said, "You're under arrest", and a struggle started.

Q. But you never told my client what he was under arrest for?

A. I didn't charge the man with resisting because I didn't think it was a warranted cause. It didn't seem he knew why he was being arrested.

Q. Who was he annoying?

A. He was annoying me. (p. 9)

* * *

DEFENDANT'S MOTION TO DISMISS AT CLOSE OF CITY'S CASE

MR. PANDILIDIS: Your Honor, at this time, I would ask for a dismissal on the charges. Patrolman Johnson testified that my client threw his arm back in a loud and boisterous manner. Now, how much noise can an arm make, I don't know. The facts show that Patrolman Johnson gets a radio run for a suspicious character. It is somewhere in the area of Stanley Avenue, somewhere. There is no evidence, and there is no charge that my client attempted to break in there or do anything else to the pony keg. Here, you have an ordinary citizen out walking; then by his own testimony (indicating), he never advised my client why he was there, or even why he was under arrest. (pp. 12, 13.)

1 [illegible]ARY
SUPR[illegible]
FILED
JUN 20 1973
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

No. 72-1366

EDWARD NORWELL,
Appellant-Petitioner,

vs.

CITY OF CINCINNATI,
Appellee-Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MR. THOMAS A. LUEBBERS
City Solicitor

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Municipal Court Prosecutor

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In The

SUPREME COURT OF THE UNITED STATES

No. 72-1366

EDWARD NORWELL,

Appellant-Petitioner,

vs.

CITY OF CINCINNATI,

Appellee-Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

STATEMENT OF FACTS

On December 25, 1971, Cincinnati Police Patrolman Johnstone received a radio run to the 300 block of Stanley Avenue in Cincinnati, Hamilton County, Ohio. Officer Johnstone was dispatched to investigate a "suspicious man hanging around the pony keg". The "pony keg" is a package 'take-out' store which was closed at that time. The officer was aware that the pony keg at this location had been broken into on several previous occasions, and as he responded to the scene, he saw the Defendant-Appellant, Edward Norwell, walk away from the pony keg. The officer parked the police car, approached the Defendant-Appellant and asked him if he lived in the area. The Defendant-Appellant looked at the officer and proceeded

to turn and walk away. The officer attempted to stop him, at which time the Defendant-Appellant threw of the restraining arm of the officer, and said, "Let off of me. I don't have to tell you people anything."

The officer in full uniform, then further identified himself, and again the Defendant-Appellant turned and walked away. The Defendant-Appellant was once again restrained at which time he became so violent that a second officer, Patrolman Stonestreet, was called by the arresting officer to assist. When Officer Stonestreet arrived the Defendant-Appellant was creating a disturbance. The Defendant-Appellant was finally restrained, placed in the police car, and taken to Central Station. Defendant-Appellant was subsequently charged and convicted of violating Section 901-D4, Disorderly Conduct Ordinance, of the Cincinnati Municipal Code. Thereafter, on August 28, 1972, the Court of Appeals for the First District of Ohio affirmed the judgment. Subsequently, the Defendant-Appellant appealed to the Supreme Court of Ohio and the Memorandum in Support of Jurisdiction to said court was denied.

It is from this decision that Defendant-Appellant now submits to the Supreme Court of the United States a Petition for a Writ of Certiorari to the Supreme Court of Ohio.

WHY THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION HEREIN INVOLVED AND WHY THIS CASE IS NOT OF GREAT OR GENERAL PUBLIC INTEREST

THE UNITED STATES SUPREME COURT HAS DECIDED THE REQUISITE STANDARDS AS TO THE CONSTITUTIONAL VALIDITY OF THE DISORDERLY CONDUCT STATUTES AND THE FACTS AND ORDINANCE HEREIN COMPLY WITH THOSE REQUIREMENTS.

ARGUMENT

In June of 1972, this Court specifically decided and set forth definite standards regarding the constitutional validity of the disorderly conduct statutes. *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Consequently, there is no basis for distinction as the factual complex of the instant case raises issues identical to those already decided by this Court in *Colten*.

The Cincinati Municipal Code Ordinance 901-D4 DISORDERLY CONDUCT, like that in *Colton*, fully complies with the due process and equal protection requirements as proscribed by the United States Constitution.[1] Precisely, this Court held that where the highest state court has limited the application of the disorderly conduct statute to instances where there is no protected right, then such statute is not impermissibly vague or broad.[2]

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[1] Defendant-Appellant, Edward Norwell was not exercising any constitutionally protected freedom and the police officer was engaged in the lawful performance of his duty.

[2] *Coates* v. *Cincinnati*, 402 U.S. 611 (1971); *Cohen* v. *California*, 403 U.S. 15 (1971); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); and *Gooding* v. *Wilson*, 405 U.S. 518 (1972) are clearly distinguishable

Therefore, by definition, the instant ordinance contains the requisite guidelines for enforcement as specifically enunciated by this Court.[3]

The Ohio Supreme Court in *Cincinnati* v. *Hoffman,* 31 Ohio St. (2d) 163 (1972), construed the disorderly conduct ordinance as neither prohibiting the lawful exercise of any constitutional right, nor escaping the understanding of any person of "common intelligence" who desires to obey it. Moreover, there was no discriminatory or selective enforcement herein involved for Defendant-Appellant's activities do not fall within the class of any constitutionally protected freedom.[4]

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from *Colten* v. *Kentucky,* 407 U.S. 104 (1972) and *Cincinnati* v. *Hoffman,* 31 Ohio St. 2d 163, 285 N.E. 2d 714 (1972), cert. den. 93 S. Ct. 1370 (1973). In *Coates, Cohen* and *Gooding,* the statutes involved therein infringed upon the First and Fourteenth Amendments of the United States Constitution. Those State Courts did not narrowly construe the application of the respective statutes and therefore said statutes were found to be unconstitutional.

[3] The Ohio Supreme Court in *Cincinnati* v. *Hoffman,* 31 Ohio St. 2d 163, 285 N.E. 2d 714 (1972) cert. den. 93 S. Ct. 1370 (1973), applied the constitutional mandates enunciated in *Colton* v. *Kentucky,* 407 U.S. 104 (1972):

> "A crime is committed only where there is no bona fide intention to exercise a constitutional right — in which event, by definition, the statute infringes no protected speech or conduct — or where the interest so clearly outweighs the collective interest sought to be asserted that the latter mus be deemed insubsantial."

[4] The police officer in the case at bar knew that previous burglaries had occurred at the location in question. The officer received a police radio run to said location late in the evening and it was dark. The officer asked the Defendant-Appellant to explain his presence. The Defendant-Appellant refused to cooperate and became noisy and boistrous.

In light of the surrounding circumstances, the officer was acting within the scope of his authority and under the mandate proscribed in *Terry* v. *State of Ohio,* 392 U.S. 1, 88 S. Ct. (1968). The *Terry* case sets forth the circumstances under which a police officer may stop and inquire of a citizen.

The issues raised in the case now before this Court are identical to those issues raised in *Colton* v. *Kentucky*, 407 U.S. 104 (1972).[5] Consequently there is no constitutional question herein involved.[6]

CONCLUSION

There was no discriminatory or selective enforcement herein involved for Petitioner-Appellant's activities do not fall within the purview of any constitutionally protected freedom.

Wherefore, Respondent-Appellee for the reasons stated herein respectfully requests the Honorable Supreme Court of the United States to find in accordance with the Supreme Court of Ohio.

Respectfully submitted,

MR. THOMAS A. LUEBBERS
City Solicitor

MR. RALPH E. CORS
Municipal Court Prosecutor

MS. DOLORES JECHURA HILDEBRANT
Assistant Municipal Court Prosecutor

Counsel for Appellee-Respondent

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[5] *Colton* was arrested for disorderly conduct when he failed to comply with a request given by a police officer in the performance of his duties. Likewise, in the instant case, Defendant-Appellant Norwell, failed to comply with several requests made by the police officer. The instant Defendant-Appellant also attempted to elude the police officer and subsequently became abusive and physically uncontrollable.

[6] Individuals may not be convicted under the Cincinnati Municipal Code, Disorderly Conduct Ordinance for the expression of any constitutionally protected freedom. *Cincinnati* v. *Hoffman*, 31 Ohio St. 2d 163 (1972) cert. den. 93 S. Ct. 1370 (1973).

NORWELL *v.* CITY OF CINCINNATI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 72–1366. Decided November 5, 1973

Cincinnati's disorderly conduct ordinance operated to deprive petitioner of his constitutionally protected freedom of speech, where it appeared that he was arrested and convicted merely because he verbally and negatively protested the arresting officer's treatment of him, and there was no abusive language or fighting words.

Certiorari granted; reversed.

PER CURIAM.

Petitioner Edward Norwell, on a plea of not guilty, was convicted of a violation of Cincinnati's disorderly conduct ordinance. The charge was that petitioner "did unlawfully and wilfully conduct himself in a disorderly manner, with intent to annoy some person." The judgment of conviction was affirmed by the Ohio Court of Appeals. Further appeal to the Supreme Court of Ohio was dismissed by that court *sua sponte* "for the reason that no substantial constitutional question exists herein."

We are persuaded that the ordinance, as applied to this petitioner on the facts of his case, operated to punish his constitutionally protected speech. We therefore grant certiorari and reverse.

The ordinance, § 901–D4 of the city's Municipal Code, reads:

> "No person shall wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person . . . ."

Petitioner, 69 years of age and an immigrant 20 years ago, is employed by his son who manages and is part

owner of a "pony keg," a small package liquor store. The petitioner works at the pony keg every evening and helps his son "because it is very dangerous." There have been break-ins at the store on several occasions and a former owner was killed there.

On Christmas night, 1971, the pony keg closed about 10:30. The son drove home, but petitioner "wanted to take a walk and get home at 11:00 to hear the news." Down the street, he was approached by Officer Johnson, who had been notified that a "suspicious man" was in the neighborhood of the pony keg. Officer Johnson testified that he approached petitioner and asked him if he lived in the area. Petitioner looked at him, "and then he turned around and walked away." The officer twice attempted to stop him, but each time petitioner threw off his arm and protested, "I don't tell you people anything." He did not run. Petitioner then was placed under arrest for disorderly conduct. Officer Johnson said he had to "push the man approximately half a block to get him into the police car. He didn't understand why he was being arrested."

Petitioner testified that he "was far from the pony keg" when the officer drove up in his car and called out something which petitioner did not understand.

> "He told me something, but I couldn't understand . . . . I said—I asked him, 'What do you want from me?' He said, 'Why are you on the street?' I said, 'I am walking on the street.' After then, he said, 'Where are you going?' I said, 'I go home.' After then, he didn't ask me anything. He was in a car. I continued to walk."

The officer pursued petitioner and grabbed him. Petitioner testified, "I didn't resist because I was concerned about my health and my life."

There is no indication in the record that it was the physical act of pushing off the officer's arm that precipitated the arrest or supported the conviction. Had this been so, one could argue, perhaps, that Mr. Norwell might have been properly charged for disorderly conduct or under a statute or ordinance that made it illegal to interfere with a police officer in the performance of his duty. That, however, is not this case. Officer Johnson testified that he "didn't charge the man with resisting because I didn't think it was a warranted cause," but that he arrested petitioner for "being loud and boisterous," and "[h]e was annoying me." The municipal judge found that petitioner was "hostile" to the officer. "I'm sure [the officer] had no feeling against this man, but this man had a feeling against him, at this time, and was not at a liberty to say." The court proceeded to find Mr. Norwell "guilty of disorderly conduct with the intent to annoy" and fined him $10 and costs "for being so noisy."

Upon this record, we are convinced that the petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him. Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer. Regardless of what the motivation may have been behind the expression in this case, it is clear that there was no abusive language or fighting words. If there had been, we would have a different case. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).

The petition for certiorari is granted. The judgment is reversed.